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FEDERAL ELECTION COMMISSION

11 CFR Parts 103, 104, 9007, 9014 and 9038

[NOTICE 2022-23]

Rulemaking Petition: Disgorgement of Contributions

AGENCY: Federal Election Commission.

ACTION: Rulemaking petition: notification of availability.

SUMMARY: On August 25, 2022, the Federal Election Commission received a Petition for Rulemaking asking the Commission to amend or clarify its regulations regarding the refunding of contributions that violate the source prohibitions or amount limitations of the Federal Election Campaign Act (“the Act”). The petitioner requests that the Commission amend its regulations to permit committees to disgorge illegal contributions to the United States Treasury, and to provide that the Commission may require disgorgement when, according to the petitioner, a refund would be unjust and create incentives for future lawbreaking.

DATES: Comments must be submitted on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: All comments must be in writing. Commenters may submit comments electronically via the Commission’s website at <http://sers.fec.gov/fosers/>, reference REG 2022-06.

Each commenter must provide, at a minimum, his or her first name, last name, city, and state. All properly submitted comments, including attachments, will become part of the public record, and the Commission will make comments available for public viewing on the

Commission’s website and in the Commission’s Public Records Office. Accordingly, commenters should not provide in their comments any information that they do not wish to make public, such as a home street address, personal email address, date of birth, phone number, social security number, or driver’s license number, or any information that is restricted from disclosure, such as trade secrets or commercial or financial information that is privileged or confidential.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Knop, Assistant General Counsel, or Mr. Tony Buckley, Attorney, Office of the General Counsel, at (202) 694-1650 or (800) 424– 9530.

SUPPLEMENTARY INFORMATION: On August 25, 2022, the Commission received a Petition for Rulemaking from the Campaign Legal Center (“Petition”). The Petition asks the Commission to “amend or clarify the scope and remedies provided in §103.3 to promote the robust enforcement of FECA.” Petition at 8.

The Petition notes that “Commission regulations currently state that committee treasurers must examine ‘all contributions received for evidence of illegality,’ and ‘shall refund’ illegal contributions to the contributors.” Petition at 1. (citing 11 CFR 103.3(b)). The Petition further notes that the requirement that committees refund improper contributions “is not required by FECA.” Petition at 2. The Petition asserts that refunding illegal contributions can undermine the enforcement purposes of FECA by unjustly rewarding those making illegal contributions. According to the Petition, “when those caught brazenly violating the law are rewarded with the return of the money they contributed—the tool of their illegal activity—it sends the regulated community and the public a very troubling message that the FEC permits violators to profit from their violations.” Petition at 2.

The Act prohibits committees from accepting contributions in excess of certain limits or from certain sources. *See, e.g.*, 52 USC 30116(a) (limiting the amount a committee may

accept from a person); 30118(a) and 30119(a) (prohibiting a committee from accepting contributions from corporations, labor organizations, national banks, and federal contractors); *but see SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) (striking down contribution limits as applied to independent expenditure-only committees). Commission regulations generally require a committee treasurer to ascertain whether a contribution exceeds the amount limitations or is from a prohibited source. *See* 11CFR 103.3(b). A contribution determined to exceed the amount limitations may be redesignated, reattributed, or returned to the contributor. *See* 11 CFR 103.3(b)(3). A contribution determined to be from an improper source must be returned to the contributor. *See* 11CFR 103.3(b)(1) and (2).

In Advisory Opinion 1996-05 (Kim), a political committee asked how it should reimburse contributions that it belatedly discovered to be unlawful corporate contributions made in the names of others. The Commission concluded that the requestor may refund the contributions to the corporation or, in the alternative, pay the amount of the contributions to the United States Treasury. Subsequently, in an unrelated matter, *Fireman v. FEC*, 44 Fed. Cl. 528 (1999), the Court of Federal Claims held that 11 CFR 103.3(b)(1) and (2) mandated a refund of all illegal contributions to the contributors regardless of the circumstances, and thereby rejected the Commission's interpretation of 11 CFR 103.3(b)(1) and (2) as permitting disgorgement of illegal contributions to the United States Treasury.

According to the Petition, “[m]any recent FEC enforcement matters involving prohibited contributions have resulted in a partial or complete contribution refund to the violator, undercutting the effect of any civil penalty.” Petition at 6. As one example, the Petition cites Matter Under Review (MUR) 7450, where a federal contractor made \$525,000 in illegal contributions and agreed to pay a \$125,000 civil penalty but had already recovered

\$500,000 as a contribution refund before the Commission’s enforcement action was completed. Petition at 6-7.

The petition argues that “[t]he near certainty that federal contractors will recover their illegal contributions—more than offsetting any civil penalties the Commission assesses—undermines the deterrent effect of enforcing the federal contractor contribution ban.”

Petition at 7. The Petition urges the Commission “to amend or clarify its regulations to explicitly recognize that illegal contributions may be disgorged, and that the Commission may require the disgorgement of illegal contributions in appropriate circumstances.” Petition at 8.

The Commission seeks comment on the Petition. The public may inspect the Petition on the Commission’s website at <http://sers.fec.gov/fosers/>.

The Commission will not consider the Petition’s merits until after the comment period closes. If the Commission decides that the Petition has merit, it may begin a rulemaking proceeding. The Commission will announce any action that it takes in the *Federal Register*.

Dated December 16, 2022.

On behalf of the Commission,

Allen J. Dickerson,

Chairman,

Federal Election Commission.

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